Supreme Court of the United States

No. 1084

W. COFFFEE, Individually and as Trustee for RUTH COFFEE COBLE, EDGAR COBLE, ORIN COFFEE, WOODSON COFFEE, JR. AND RAY C. COFFEE, OLLIE COFFEE WILLIS AND HUSBAND, WADE WILLIS, J. K. COFFEE AND VELDA BANGS COFFEE,

Petitioners,

v.

THE SHAMROCK OIL & GAS CORPORATION.

AMICI CURIAE BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned attorneys represent to the court that they have several pending cases, involving gas accounting which may be affected by the outcome of this case in that many of the compensation clauses of lease contracts or sales contracts are determined by market value and are, therefore, related to the questions involved herein. Likewise, the undersigned attorneys represent various royalty

owners and oil and gas lease operators and they are called upon currently for legal opinions and advice concerning the respective rights of the parties under oil and gas leases and contracts affecting the sale of gas.

It is submitted that the Panhandle gas field is the largest gas field in the world. Its vastness is referred to in **Consolidated Gas Utilities Corp. v. Thompson, et al.,** 14 Federal Supplement 319, to-wit:

> "The field is a belt lying in a southeasterly northwesterly direction and extends from eastern Wheeler County to northern Moore County, Texas. It is approximately 124 miles in length with an average width of approximately 20 miles, containing 1,504,386 acres; there being 1,066,662 acres of sweet gas, and 437,724 acres of sour gas territory. The field is located in the counties of Hartley, Moore, Hutchinson, Potter, Carson, Gray and Wheeler. The oil producing area covers a belt about 90 miles in length lying on the northeast flank of the structure."

It is submitted that the opinion in this case is of vast public importance, and affects millions of dollars of gas royalties owned by citizens of these United States, particularly in the Panhandle gas field in Texas.

Furthermore, the questions before the court are likewise of public importance because the construction of Rule 52-A of the **Rules of Civil Procedure** which provide that findings of facts should not be set aside unless clearly erroneous, is involved.

NATURE OF CASE

This was a suit for accounting, brought by the land owner against the lessee or operator of an oil and gas lease. In the lease the provision for which the lease owner agreed to pay royalty for the gas is set out in Clause 3-B of the lease as follows:

> "* * * gas produced from said land and sold or used off the land or in the manufacture of gasoline, including casinghead gas, the market price at the well of one-eighth of the gas so sold or used * * *." (R. p. 60.)

This lease was the sole contract between the parties to the suit. **No casinghead gas contract or division order was signed by petitioner, Coffee.**

J. H. Dunn, Vice-President of defendant company, identified a typical division order and upon inquiry by the court as to whether Coffee executed any division order, counsel for Shamrock stated:

> "I do not contend that he executed a division order." (R. p. 484.)

Respondent, Shamrock, did not sell the gas at the mouth of the well, but delivered it to its gasoline plant where it extracted the gasoline and other liquids and then sold the residue gas to carbon black companies and other purchasers. (R. p.....)

In making payment to the land owner for the royalty, although defendant did not contend that petitioner, Coffee, had signed any division order to ratify any casinghead gas contract, but defendant, used the schedule of prices

paid under such casinghead gas contract the same as though Coffee had signed same and it was contended that such payment represented the market value of the gas at the well.

The trial court made his finding of fact that this price is reflected by the schedule adopted in the contract by the Natural Gasoline Association of America was not the regular and fair market price at the wells but was a distressed price. (R. p. 664.)

ARGUMENT

This amici curiae argument is addressed to the holding of the Circuit Court of Appeals, 140 Federal (2d) 409-413, that there was no proof of this distressed or suppressed price, and that certain contracts between independent parties, not members of the Natural Gasoline Association of America, introduced by petitioners, were not comparable and had little or no probative value.

In this argument, Natural Gasoline Association of America will be referred to as N. G. A. A.

We submit briefly that there was abundant evidence in the record to sustain the trial court's findings that the **adherence** to the N. G. A. A. contract between members of the N. G. A. A. had the distinct and direct effect of suppressing and restricting the price. For the sake of brevity, we refer to the arguments and quotations of the evidence in petitioners' brief concerning these independent transactions between parties who dealt at arm's length, who were not members of the N. G. A. A., which shows that any sale

of gas not restricted by the provisions and schedules of the N. G. A. A. contract brought more money to the royalty owner or producer of the gas. We shall quote briefly from the witnesses who were employees of members of the N. G. A. A., who show that they followed the N. G. A. A. schedule in accounting for gas and also from the other witnesses who demonstrated the effect of adhering to the schedule. At page 109, defendant introduced its Exhibit 1 as follows:

"DEFENDANT'S EXHIBIT 1

"Casinghead Gas Contract. Standard form Revised —Adopted by Natural Gasoline Association of America, Nov. 7, 1932 * * *."

Section 5 of the contract, under "Residue Gas" provides as follows:

"It is agreed and understood by and between the parties hereto, that if and when the residue gas remaining after the extraction of gasoline from such casinghead gas shall be more than sufficient for the needs of Buyer in the operation of said gasoline plant and more than sufficient for the needs and requirements of Seller for the development and operating purposes upon the premises from which the said casinghead gas is produced, then, and in that event, the Buyer shall have the right to sell any or all surplus residue gas so remaining; provided that in the event of sale by the Buyer of any or all of such residue gas, Buyer shall pay to the Seller herein fifty per cent of the net proceeds received from the sale of such gas, such payments to be made at the same time as other payments hereunder. Net proceeds as herein used is defined as the gross proceeds less any cost of boosting

and/or transportation necessary to market such gas * * *." (R. p. 112.)

In addition to the payment for residue gas the other constituent in raw gas to be paid for was the gasoline. The gasoline content was to be arrived at by settlement test determined by field compression or charcoal absorption as set out in paragraph 8 of the contract (R., exact page, 113). The price to be paid for the gasoline content was set out in a schedule of brackets in paragraph 10 of the contract. (R. pp. 115-116.) Bracket 1 applies where the content was less than .75 gallons per thousand cubic feet, and subdivision A provides that if the average price is 2¢ per gallon, or less, 5% of the value of the gasoline would go to seller; accordingly, under subdivision B if the average price were more than 2¢, but less than 4¢ per gallon, 10% of the value of the gasoline would go to the seller. Accordingly, provision is made for gasoline content between .75 gallons and 1.75 gallons per M. C. F. In bracket number 2 provision is made in the schedule for gasoline content above 1.75 gallons per M. C. F.

Under this N. G. A. A. contract the only two constituents accounted for were a portion of the test gasoline and a portion of the residue.

It was developed by petitioners that it was the practice of defendant and the other gas operators to extract a great deal more liquefied petroleum gas than the test reflected. (Sanders' testimony, Record pages 195-198.) But the N. G. A. A. members in accounting for the gas never paid for the gasoline actually extracted above the field

test. (Plunkett testimony, Record page 349, and Turner Testimony, Record page 382.)

It will be borne in mind that it was not contended that petitioner, Coffee, signed any casinghead gas contract or division order, but the defendant claimed, through its many witnesses, employees or accountants of other gas companies, that payment under the schedule set out in such contract (Defendant's Exhibit 1) was payment of the market price.

Record, page 359, L. N. Plunkett, having identified himself at page 338, as being in the Comptroller's Department of Phillips Petroleum Company, testifies:

> "Q. You follow the terms in the schedule and the charcoal test?
>
> "A. Yes."

Record, page 354, R. D. Turner identifies himself as having been an employee of Skelly Oil Company for nearly 20 years, and at page 375 he testified:

> "Q. Nowhere in the revision of your contract down to date have you ever permitted a royalty owner to participate in more than fifty percent of the residue, have you?
>
> "A. No, we have never paid him more than fifty percent."

Further, at page 382 the witness testified:

> "Q. I mean under that N. G. A. A. contract, whether it is a royalty owner or seller, what I am speaking of, these prices you pay that you calculated they were

all on the basis that the seller or royalty owner did not participate in the gasoline content other than the charcoal test content?

"A. That's right."

Record, page 391, J. W. Cowles was identified as being Assistant Manager of the Gas Division of the Shell Oil Company. At page 447 he gave a list of the major companies belonging to the N. G. A. A. as being the Shell, Phillips, Skelly, Shamrock, Carter, Continental, Hanlin-Buchanan, Warren Petroleum Company.

At page 449, concerning amendments of the regular N. G. A. A. contract, witness testified:

"Q. In that, you did not revise or make any revision in the 50-50 split of the residue?

"A. No, sir.

"Q. Although you knew at that time that the Department of the Interior on Indian land had ruled on those lands they should recover one-eighth royalty on a value of 100 per cent of the residue, didn't you?

"A. We were aware of that decision, but we appealed from that ruling and took it clear to Washington, to the Department of Interior, trying to get it set aside as we did not think it was equitable and do not now.

"Q. You did not get it set aside?

"A. No, sir, but we do not think it is equitable now."

At page 508, the witness, J. H. Dunn, having identified himself (Tr. 168) as Vice-President and General Manager of respondent, Shamrock, testified:

"Q. Well, now, then, if I understand you, the charcoal test, or whatever test is used, the field test, that

is designed to take out the gasoline in other words, that determines the actual gasoline?

"A. Yes, that is designed to determine the 26-70 net gasoline content of the gas.

"Q. These butanes that you mention are not included in that category, are they?

"A. No."

In the opinion of the Circuit Court of Appeals, 140 Federal (2d), page 1402, it is inferred that petitioner, Coffee, complained that the field test was not a fair method of ascertaining gasoline content. As we understand the record, no such complaint was ever made, but the petitioner's complaint simply was that the field test showed only the 26-70 gasoline and that under the N. G. A. A. schedule no payment was made for additional gasoline or other liquids extracted over and above the field test and that the evidence showed considerably more raw gasoline and raw make consisting of other valuable hydrocarbons were actually extracted. We shall point out that if the accounting had not been restricted by the gasoline bracket schedule above referred to, a royalty owner or one who furnished gas would realize a great deal more for his portion of gasoline. For instance, under the N. G. A. A. schedule, gas testing .75 gallons or less with a price from 2¢ to 4¢ would pay the seller or one who furnished gas, 10% of the value. (R. p. 115.) While under a contract not bound by such schedule as testified by witness Roberts, 25% was paid on **full plant recovery.**

M. E. Roberts at Record page 69 identifies himself as having charge of the oil and gas production of the 6666

Ranch in Carson County; and at page 72 testified as to the contract with J. M. Huber Corporation, and as to the pay provision thereof, said:

"Q. What is that provision, Mr. Roberts?

"A. Well, on the sour gas, the gasoline processed from the sour gas, there is a provision whereby we are to get the straight 25% of the gasoline extracted, that is, recovered, that is, plant recovery.

"Q. You mean actual recovery or some theoretical test?

"A. No, sir, no theoretical test at all. It is actual plant recovery, and on the residue there is a provision whereby we get the market value of the residue, of course, based on the price the carbon black paid, in no event to be less than one and a half cents per thousand cubic feet."

At Record page 91, the witness further testified:

"Q. Mr. Roberts, to get at the point; if I understood you awhile ago, your contract with Huber that you mentioned, that you got twenty-five percent of the actual plant recovery?

"A. That's right.

"Q. Now, you are familiar with the N. G. A. A. contract that provides that a royalty owner or seller, rather, participated only to the extent of the charcoal test, are you?

"A. That is right.

"Q. Well, now, does that make a material difference in the price, resultant price to the royalty owner, as to whether he participates in the actual plant recovery or participates only in the charcoal test, that is what I am getting at?

"A. Yes, sir."

Witness W. E. Sanders (R. pp. 195-196) identified himself as being an accountant with several years' experience in the gas business. At page 224 he was asked about the plant efficiency and the recovery of liquids and at page 225, said:

> "I have six plants here in the Panhandle field with runs from December, 1937 to September, 1941; these 6 plants average a recovery over and above this, that is, raw make over and above the charcoal test, 232 percent."

Being asked to explain what he meant by "raw make", the witness answered:

> "That is the raw volume, raw gallons of liquid extracted at the plant when they process it." (R. p. 225.)

Witness C. J. Fowlston, identified himself as a Consulting Gas Engineer, beginning in the business in 1922. (R. p. 233.) At page 245, being asked about the amount the gas companies would pay under the N. G. A. A. contract if they allowed the seller to participate in all the liquid recovery, he was asked what effect that would make the average price under the N. G. A. A. contract, and at page 246 answered:

> "Under the example given there that we have discussed a little while ago, that two thirty-three percent above, in my opinion, **it would double it.**"

Thus, it can be seen at a glance that **adherence** to the N. G. A. A. contract (Defendant's Exhibit 1, R. p. 109) certainly suppressed the price.

The Roberts' testimony reflected clearly that the 25% basis under his Huber contract was higher than the N. G. A. A. schedule. Among the many vices in adhering to the schedule of the N. G. A. A. contract, the predominant and outstanding ones are:

1. **Such adherence** did not permit the sellers or royalty owners to participate in any liquid recovery over and above the charcoal test while Fowlston said it would double the payments if they would.

2. **Such adherence** did not permit the seller or royalty owner to participate in more than 50% of the residue gas. While Witness Cowles, admitted that the Department of the Interior had ruled that on Indian lands the full 100% had to be accounted for.

WHEREFORE, it is submitted that this evidence certainly supported the trial court's Finding of Fact No. 6 (R. p. 54), that the use of the N. G. A. A. schedule resulted in a suppressed market.

It is submitted that this case is of vast importance, affecting the greatest gas field in the world, and that this Court should grant the writ of certiorari and carefully analyze all of the evidence and issues in this case.

Respectfully submitted,

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